

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

WASHINGTON TOXICS COALITION,  
et al.,

Plaintiffs,

v.

ENVIRONMENTAL PROTECTION  
AGENCY, et al.,

Defendants,

and

CROPLIFE AMERICA, et al.,

Intervenor-Defendants.

No. C01-0132 C

OPPOSITION OF INTERVENOR-  
DEFENDANTS CROPLIFE  
AMERICA, ET AL., TO  
PLAINTIFFS' "MOTION FOR  
RELIEF FROM DEADLINE FOR  
FILING DOCUMENTATION . . . ."

Noted on Motion Calendar:  
Wednesday, April 6, 2005

Intervenor-Defendants CropLife America, *et al.* ("CLA")<sup>1</sup> hereby oppose plaintiffs' "Motion for Relief from Deadline for Filing Documentation Supporting Reply in Support of Plaintiffs' Motion Modify July 2, 2002" (Dkt. No. 327). Plaintiffs' motion should be denied for many reasons:

1. The facts alleged in support of the motion do not provide good cause for allowing plaintiffs to introduce the documentation out of time. Plaintiffs attribute their inability to meet their

<sup>1</sup> This opposition is filed on behalf of all intervenors except the Washington State Farm Bureau and the Washington State Potato Commission, which are separately represented.

1 reply deadline to the failure of their declarant (Ms. Schreder) to provide the documents to counsel  
2 until after the close of business on March 24, 2005, aggravated by her absence from the office  
3 until the following Monday. Mot. at 2. Be that as it may, it does not explain why Ms. Schreder  
4 waited until then – two days *after* the reply deadline – to provide counsel with documents that  
5 she admits obtaining from the Washington State Department of Agriculture (“WSDA”) *nearly a*  
6 *year earlier*, in May and June 2004. See Schreder 2d Decl. ¶ 2 & Exs. 1, 2. This discrepancy  
7 is particularly egregious given that on February 4, 2005, plaintiffs had included, as initial support  
8 for their motion to modify the July 2002 order, one of the documents Ms. Schreder had obtained  
9 in the same WSDA transmittals. See Schreder 2d Decl. ¶ 3 (citing Goldman 5th Decl. Ex. 2).

10 2. Plaintiffs’ motion rests on Ms. Schreder’s implausible explanation that, because  
11 she is “not in the office on Fridays, today [Monday, March 28, 2005] is the first day I could  
12 submit the additional documents to the Court.” Schreder 2d Decl. ¶4. See also Mot. at 2  
13 (March 28, 2005 was “the first business day on which the Toxics Coalition could submit the  
14 supporting documentation to the Court”). Nonsense. That “first business day” was back when  
15 plaintiffs obtained the documents from WSDA last year, not last week when they belatedly  
16 decided to present the material to the Court. Even then, plaintiffs could have used, but apparently  
17 chose not to, commonplace electronic methods of document transmittal such as e-mail or  
18 telecopy – to say nothing of a making simple trip across town for execution of the declaration.  
19 For all these reasons, the “relief” plaintiffs request is not really from a Court deadline, but from  
20 problems of their own making. Their motion should be denied.

21 3. The motion should be denied for the further reason that plaintiffs fail to tie the  
22 belatedly proffered material to the reply brief they say it “supports.” Plaintiffs’ motion and the  
23 Schreder declaration are entirely silent about which of plaintiffs’ reply arguments this material  
24 supports or what its relevance is to their request to modify the July 2002 order. The Court and  
25 the other parties should not be left to guess at the material’s significance, and it is too late for the  
26 plaintiffs to explain these points now. See *Corson and Gruman Co. v. NLRB*, 899 F.2d 47, 50

1 n.4 (D.C. Cir. 1990) (parties must “raise all of their arguments in the opening brief to prevent  
2 ‘sandbagging’” of the opposing parties).

3 4. Plaintiffs’ characterization of this as a motion for “relief from deadline” may have  
4 gotten the motion on the fast track, but it obscures their legally-disfavored ulterior goal of using a  
5 reply brief to introduce new evidence. Remarkably, plaintiffs assert that no party will be  
6 prejudiced by the filing because “no other party has the right to submit additional briefing” on the  
7 motion to modify the July 2002 order. Mot. at 2. But the close of briefing on that motion is  
8 precisely why the federal defendants and intervenors *would be prejudiced* by the introduction of  
9 new evidence now. Since arguments based on the new material were not made in plaintiffs’  
10 opening motion to modify the July 2002 order, it is improper for them to attempt to raise those  
11 arguments by way of appending new evidence to their reply brief – and belatedly, at that. *See*  
12 *United States v. Boyce*, 148 F. Supp.2d 1069, 1085 (S.D. Cal. 2001) (“it is improper for a  
13 party to raise a new argument in a reply brief”) (collecting cases).<sup>2</sup>

14 5. Finally, Plaintiffs’ uncompromising view that, despite their newly proffered  
15 evidence, there can be no additional briefing on their motion to modify the July 2002 order is  
16 mistaken. As noted above, the law strongly disfavors springing new arguments and evidence on  
17 litigants in a reply brief. Further, it is well-settled that a court “should not consider the new  
18 evidence without giving the [nonmoving parties] an opportunity to respond.” *Provenz v. Miller*,  
19 102 F.3d 1478, 1483 (9th Cir. 1996) (quoting *Black v. TIC Inv. Corp.*, 900 F.2d 112, 116  
20 (7th Cir. 1990)). *Accord Beaird v. Seagate Technology, Inc.*, 145 F.3d 1159, 1164 (10th Cir.  
21 1998) (citing *Cia Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 410 (1st Cir.

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24 <sup>2</sup> *See also, e.g., United States v. Bohn*, 956 F.2d 208, 209 (9th Cir. 1992) (noting that courts generally  
25 decline to consider arguments raised for the first time in a reply brief); *United States v. Boggi*, 74 F.3d 470, 478  
26 (3d Cir. 1996) (noting that considering arguments raised for first time in reply brief deprives opposing party of  
adequate opportunity to respond); *Playboy Enters., Inc. v. Dumas*, 960 F. Supp. 710, 720 n. 7 (S.D.N.Y. 1997)  
 (“Arguments made for the first time in a reply brief need not be considered by a court.”).

1 1985)). Thus, if the Court were to allow it in this instance, the other parties should be given a  
2 reasonable opportunity to respond on the admissibility and substance of that evidence.

3 **CONCLUSION**

4 Plaintiffs have failed to demonstrate good cause either for relief from the reply brief  
5 deadline set by the local rules, or for introducing new evidence in a reply brief while denying  
6 opposing parties an opportunity to respond. Therefore, plaintiffs' motion for relief from deadline  
7 should be denied and the new documentation that plaintiffs seek to introduce should be rejected.

8 Respectfully submitted this 31st day of March, 2005.

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